

# **WEBINAR**

# **WEDNESDAYS**



**Wednesday, March 31, 2021**

## **Addressing Sexual & Domestic Violence: Revisiting the Confrontation Clause**

Presented by:


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Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL  
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Phoenix, Arizona 85012

ELIZABETH BURTON ORTIZ  
EXECUTIVE DIRECTOR



# Webinar Wednesday

## The Confrontation Clause Re-visited

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“That past is never dead, it’s not even past.”

William Faulkner, *Requiem for a Nun*

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“Get thee to a nunnery, go. Farewell. Or, if though wilt needs marry, marry a fool, for wise men know well enough what monsters you make of them.”

William Faulkner, *Requiem for a Nun*

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## Everything Changed in 2003

- The History of the Confrontation Clause
- *Crawford v. Washington* – the late Justice Antonin Scalia interprets that history
- *Crawford's* Spawn – The pendulum swings wildly
- 17 or so years later

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## What was the state of play in 1789?

Justice Scalia relied heavily on what the Framers knew about criminal procedure in England, and what was experienced as abuses of basic rights

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## A handsome cad named Sir Walter Raleigh

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### Sir Raleigh's Contributions to Us All....

Poetry most of us have never heard of      Tobacco

Oppressing Ireland      Raleigh, North Carolina

Being beheaded after dodgy trial

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### The Trial(s) of Sir Walter Raleigh

- Was imprisoned in the Tower of London for marrying without Queen Elizabeth's permission
- The Queen released him to pirate the Spanish, returned to HM's favor
- Did some exploring in South America looking for *El Dorado*
- Returned to the Tower after being charged with treason against James I, Elizabeth's successor - This is the Important Trial
- Spared by James I, he was released to go back to Venezuela on condition that he *not attack Spanish colonies or shipping*

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### The Trial(s) of Sir Walter Raleigh

- A friend and subordinate attacked a Spanish outpost on the Orinoco River
- The angry Spanish demanded that Raleigh's life sentence be reinstated
- He was beheaded on October 29, 1618
- "What dost thou fear? Strike, man, strike!"

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The principal evidence against Raleigh was the written confession of his friend, Baron Cobham.

Representing himself, Raleigh called the confession hearsay, and demanded Cobham testify and be subject to cross-examination

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### The Marian Bail and Committal Statutes

- Justices of the Peace were required to examine suspected felons and their accusing witnesses before granting bail or committing them to jail pending trial
- If those pretrial examinations were to be admissible at trial, the witness must be unavailable to testify in person, and the accused must have had a prior opportunity to cross-examine the witness

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### The Underpinning and Overarching Concepts

- The Constitution favors in-person testimony, tested in the crucible of cross-examination
- The use of hearsay evidence developed by the government, Cobham's probably forced confession, without opportunity to test it in the crucible is unfair
- Even prior sworn testimony, like that of the accusing witness during the time of Queen Mary, is inadmissible at trial unless the accused had an opportunity to cross-examine the witness at the bail hearing

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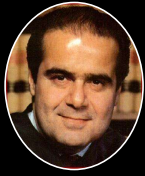
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testimonial hearsay  
is inadmissible  
unless the  
declarant is  
unavailable and  
there was a prior  
opportunity to  
cross-examine

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### A Clue from the Constitution

Thus, the most important instances in which the Clause restricts the introduction of out-of-court statements are those in which **state actors** are involved in a **formal, out-of-court interrogation** of a witness **to obtain evidence for trial**...Even where such an interrogation is conducted with all good faith, introduction of the resulting statements at trial can be unfair to the accused if they are untested by cross-examination. Whether formal or informal, out-of-court statements can evade the basic objective of the Confrontation Clause, which is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial.

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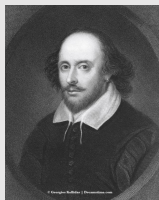
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### "Cry havoc, and let slip the dogs of war!"

- What statements are "testimonial?"
  - The DV victim's affidavit in *Crawford* was undoubtedly testimonial
- When is a witness unavailable?
- What is a sufficient prior opportunity at cross examination?



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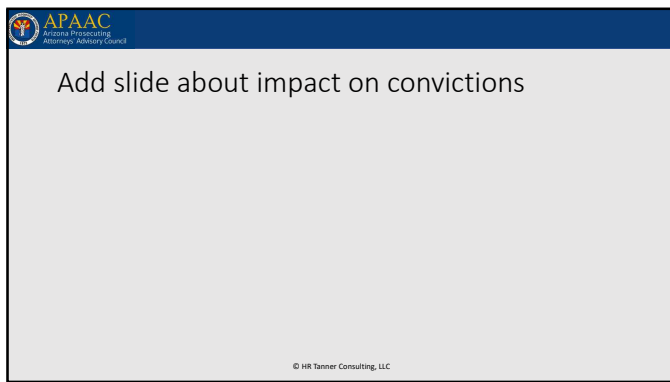
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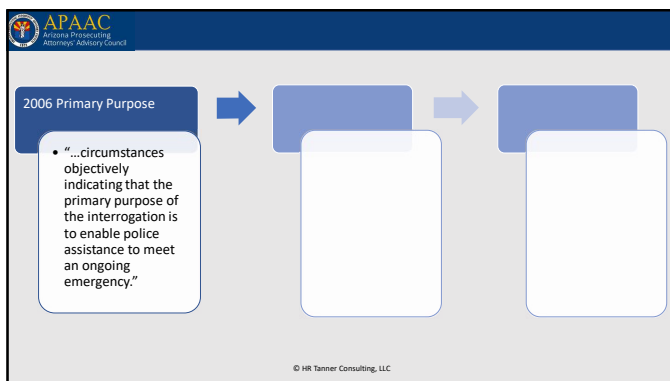
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## Still in Play!

- Initial police inquiries - Such exigencies may *often* mean that "initial inquiries" produce nontestimonial statements."
- Statements made to other than law enforcement
- Medical exception

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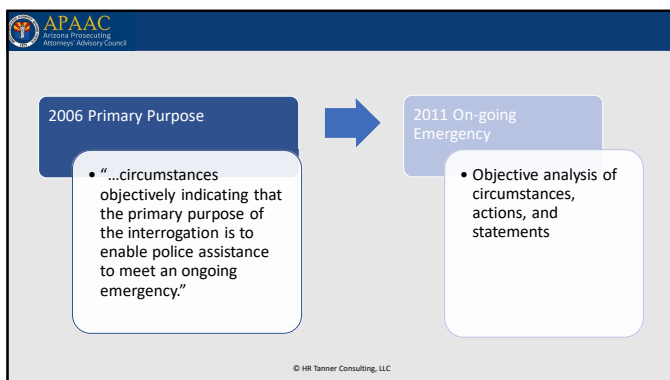
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"Depend upon it, sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully." *Samuel Johnson*

- an ongoing emergency that threatens the police and public and not a single victim
- What kind of weapon, if any, was employed
- The medical condition of the victim in that it sheds light on the victim's ability to have any purpose at all, never mind a testimonial one

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"Depend upon it, sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully." *Samuel Johnson*

- Formality of the encounter remains important
- The statements and actions of both the declarant and the interrogators

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The State of Play

- "In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant."
- Statement to others
- Medical diagnosis

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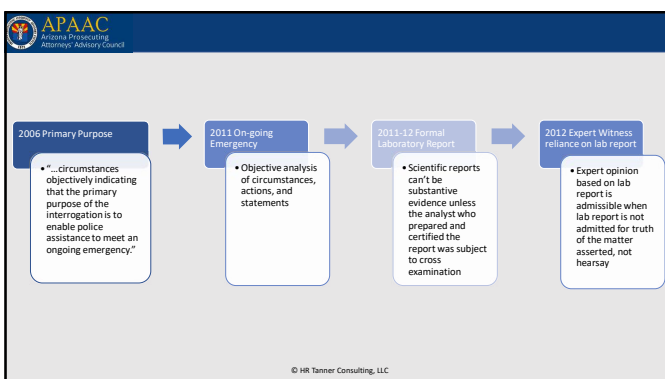
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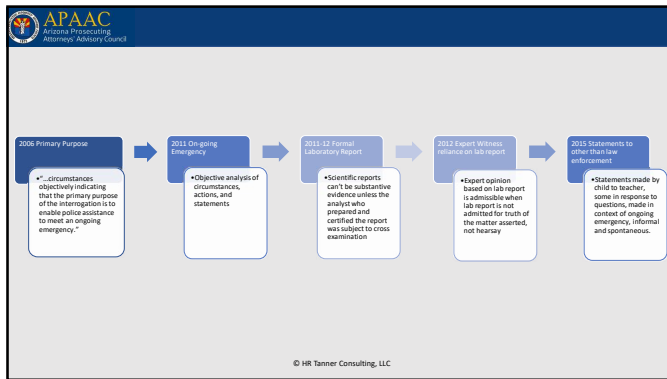
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## Now What?

- statements by very young children will rarely, if ever, implicate the Confrontation Clause
- statements to individuals other than law enforcement officers are not *categorically* outside the Sixth Amendment's reach

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## What's the Sit Rep?

*Crawford* does not apply...

- when witness/declarant testifies
- where the 6<sup>th</sup> Amendment does not apply – i.e. civil child neglect, sentencing, bail, probation or parole, pre-trial evidentiary hearings
- Non-hearsay statements, jailhouse calls
- Hearsay statements not admitted for truth of the matter asserted

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## Wither Now With *Crawford* Issues?

- Lingering testimonial hearsay determinations
- Non-testimonial Statements – oft forgotten
- When is a witness “unavailable”

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## Statements made to SANE/SAFE

- 803(4) Medical Purpose
- Yeah, it's fact driven, but what is *primary purpose*



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## Determining Testimonial

- Law Enforcement “involvement”
- Where does it take place – separate suite outside hospital need explanation
- Follow standard *medical protocol* – Most exams start with medical history, “Why are you here?”
- Evidence collection is a *purpose* but not the primary one

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### Proper Foundation to Establish Primary Purpose

All we need to do is explain what things were like before SANE became a specialty

"[Forensic] nurses fill a void in our medical system, providing critical treatment to patients at a time of great physical, emotional, and psychological vulnerability . . . But they also have special expertise in gathering evidence for subsequent prosecution of the offender, which raises appropriate concerns about whether the statement was made for the purposes of seeking medical care or whether a medical provider could have reasonably relied upon the statement for diagnosis or treatment of the declarant." 242 P.3d at 339-40;

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### Consider...

- Why was the specialty of Sexual Assault Nurse Examiner created? What was it like for victims getting medical care before then?
- What is your goal (primary purpose) during the exam?
- Why are you trained to collect potential evidence?
- Do you tell your patients that they can refuse the evidence gathering procedure?

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### Consider...

- If they refuse, what do you do, stop the exam?
- Can the patient consent to the evidence collection portion of the medical forensic exam and refuse to turn samples over to law enforcement? Do you stop the exam at that point?
- Do you provide treatment, or referrals to other medical facilities if you can't adequately treat the patient's injuries? Is there any follow up on the success of the treatment you provided?

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### Consider...

- Describe the course of the exam. Do you follow that in every case? Did you follow it in this case?
- What is a medical history?
- Is this similar to what is done by other health care providers?
- Is the identity of the person causing the injury sometimes important to your diagnosis, treatment, and discharge plan?

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### In other words, establish the predicates for admission of 804(4) statements, plus a little more.

See, *State v. Hill*, 236 Ariz. 162, 336 P.3d 1283 (Ariz. App. Div. 1, 2014)  
And *State v. Lopez Zamora*, No. 1 CA-CR 17-0065 (2018) *unpub.* (SANE asked directly about primary purpose, started exam with history, no LE present, medication prescribed, referral to ER to access potential injuries)

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### Expert Testimony – Rage Against the Machines

Personally, I like machines, “cause they are devilishly hard to cross-examine.  
And can we really say that a machine can generate hearsay?

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### Why is it offered?

- As a basis for an expert's opinion pursuant to 703, and therefore not for the truth of the matter asserted (by whom? Or what?)
- Or is testifying witness acting as a conduit to a non-testifying expert's opinion?

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### Clear as Mud

"For these reasons, we conclude that the proposed testimony of Dr. Kelly contains significant elements of hearsay and the functional equivalent of hearsay for Confrontation Clause purposes. The trial court was therefore correct in applying Confrontation Clause analysis to the proposed testimony."

"The criminalists who performed the blood tests and interpreted the results surely expected their statements of the results to be used prosecutorially."

*State v. Moss*, 215 Ariz. 385, 160 P.3d 1143 (Ariz. App. Div. 1 2007), review denied and ordered depublished, 217 Ariz. 320, 173 P.3d 1021 (Ariz. Nov 29, 2007) © HR Tanner Consulting, LLC

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### Painted into a Corner

- A machine or scientific instrument cannot be a declarant
- The one doing the test and interpreting the result must be the "declarant"
- Many scientific test results require no interpretation (opinion) to be relevant and damning (accusatory)
- The criminalist doing a blood alcohol test does not certify, testify, or swear to anything other than the instrument's results are reliable and the test reliably done

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## Painted into a Corner

- This is not a Confrontation problem, but an admissibility of test results under evidence law problem – reliability, relevancy, and weight
- Raising this to the level of a Constitutional problem results in fuzzy logic
- *Crawford* did not use the phrase “functional equivalent of hearsay,” rather, opinion talked about the “functional equivalent” of “*ex parte* in-court testimony...such as affidavits, custodial examination, prior testimony the defendant was unable to cross-examine”

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## Enter *Williams v. Illinois*

- State's expert testified that a DNA profile produced by an outside laboratory matched the defendant's profile
- Report itself was not admitted
- There was ample evidence that established the reliability of the outside lab's result
- In plurality opinion the Court found that the report was nontestimonial
- Confrontation Clause prohibits formalized "out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct."
- Outside lab report's primary purpose was to catch a dangerous rapist still at large

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## Out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct are tantamount to Baron Cobham's forced letter and confession?

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Respectfully, I believe we owe lower courts struggling to abide our holdings more clarity than we have afforded them in this area. Williams imposes on courts with crowded dockets the job of trying to distill holdings on two separate and important issues from four competing opinions. The errors here may be manifest, but they are understandable and they affect courts across the country in cases that regularly recur. I would grant review.

Stuart v. Alabama, 139 S.Ct. 36 (2018) opinion of Justice Gorsuch dissenting from denial of cert.

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You have the right to remain silent, just not the ability

- Jail house calls and confrontation calls
- Defendant's statements obviously not hearsay
- What about the statements of the victim?

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You have the right to remain silent, just not the ability

Generally, the victim's statements are offered for a non hearsay purpose, such as the context for the defendant's statements

State v. Scott, 1 CA-CR 07-0211

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## You have the right to remain silent, just not the ability

- Adoptive admissions are a rich vein of non-hearsay to admit
- Victim's statements are still admitted for non-hearsay purpose
- Defendant's reaction to them – in word and deed, can become defendant's non-hearsay statement adopting the victim's statement

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## There's a Rule For That

- Arizona Rule of Evidence 801(d)(2)(B)
- "Adoption occurs when a defendant affirmatively agrees to statements made in his presence, or expounds on the statements by adding his own 'explanations and comments.'"
- Witness testified to P's (non-testifying declarant) admission to role in a robbery, and defendant added that he "lived for this [robbing people]" and it was his "drug of choice"

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## But What if Defendant Actually Remains Silent?

- Silence can be a tacit admission of the facts stated (where the truth of the facts embraced in the statement is within such other person's knowledge and the circumstances are such as naturally call for a reply if he did not intend to admit such facts)
- Offer not valid when considering LE interrogation or custodial silence

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Listen to those jailhouse calls  
as much as possible!

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